NOVA SCOTIA COURT OF APPEAL

Citation: *Cameron v. Nova Scotia Association of Health Organizations Long Term Disability Plan*, 2019 NSCA 30

Date: 20190418
Docket: CA 477531
Registry: Halifax

Between:

Angela Lee Cameron

Appellant

v.

Nova Scotia Association of Health Organizations Long Term Disability Plan

Respondent

Judge: The Honourable Justice Cindy A. Bourgeois

Appeal Heard: March 28, 2019, in Halifax, Nova Scotia

Subject: Interplay of contractual limitation period and s. 21(2) of the *Limitation of Actions Act*, S.N.S. 2014, c. 35

Summary: The appellant, Angela Lee Cameron, worked at St. Martha's Hospital in Antigonish, Nova Scotia for 25 years. In September 2015, she applied under the Nova Scotia Association of Health Organizations Long Term Disability Plan (the "Plan") for long-term disability benefits. She was notified in May 2016 that her claim was denied.

In November 2017, Ms. Cameron filed a Notice of Action and Statement of Claim in the Supreme Court of Nova Scotia. She sought, amongst other things, enforcement of the benefits she claimed she was entitled to under the Plan. The Trustees of the Nova Scotia Association of Health Organizations Long Term Disability Plan Trust Fund (the respondent) filed a defence denying her entitlement to benefits.

The respondent filed a motion for summary judgment requesting Ms. Cameron's claim be dismissed. The respondent contended that she had started her action outside the one-year limitation period embodied in the Plan, and therefore it should not be allowed to proceed. It relied on s. 21(2) of the *Limitation of Actions Act*, as amended, which provides:

> 21 (1) A limitation period established by this Act may be extended, but not shortened, by agreement.
>
> (2) Subsection (1) does not affect an agreement made before the coming into force of this Act.

The motion was heard in chambers by the Honourable Justice Peter Rosinski. After hearing from the parties, the chambers judge granted the motion and dismissed the claim. Ms. Cameron appealed to this Court, alleging the chambers judge erred in his interpretation and application of s. 21(2) of the *Limitation of Actions Act*.

Issue: Did the chambers judge err in his interpretation and application of s. 21(2) of the *Limitation of Actions Act*?

Result: Appeal dismissed with costs.
The application judge correctly interpreted and applied s. 21(2) of the *Limitation of Actions Act*. The Plan, an agreement that pre-existed the *LAA*, contained a limitation period of one year. By virtue of s. 21(2) of the *Limitation of Actions Act*, it superseded the limitation period set out in the legislation. The appellant brought her claim outside the time limit embodied in the Plan. This justified the granting of summary judgment.

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Respondent

Judges: Beveridge, Bryson and Bourgeois, JJ.A.

Appeal Heard: March 28, 2019, in Halifax, Nova Scotia

Held: Appeal dismissed with costs, per reasons for judgment of Bourgeois, J.A.; Beveridge and Bryson, JJ.A. concurring

Counsel: Madison Veinotte, for the appellant
David Hutt and Jennifer Keliher, for the respondent

Reasons for judgment:

[1] The appellant, Angela Lee Cameron, worked at St. Martha's Hospital in Antigonish, Nova Scotia for 25 years. In September 2015, she applied under the Nova Scotia Association of Health Organizations Long Term Disability Plan (the "Plan") for long-term disability benefits. She was notified in May 2016 that her claim was denied.

[2] In November 2017, Ms. Cameron filed a Notice of Action and Statement of Claim in the Supreme Court of Nova Scotia. She sought, amongst other things, enforcement of the benefits she claimed she was entitled to under the Plan. The Trustees of the Nova Scotia Association of Health Organizations Long Term Disability Plan Trust Fund (the respondent) filed a defence denying her entitlement to benefits.

[3] The respondent also filed a motion for summary judgment requesting Ms. Cameron's claim be dismissed. The respondent contended that she had started her action outside the one-year limitation period embodied in the Plan, and therefore it should not be allowed to proceed.

[4] The motion was heard in chambers by the Honourable Justice Peter Rosinski. After hearing from the parties, the chambers judge granted the motion and dismissed the claim. Ms. Cameron now appeals to this Court, alleging the chambers judge erred in his interpretation and application of the *Limitation of Actions Act*, S.N.S. 2014, c. 35, as amended (the "*LAA*").

[5] For the reasons that follow, I would dismiss the appeal.

Background

[6] In his written reasons, reported as 2018 NSSC 90, the chambers judge set out the factual background giving rise to the dispute. No issue has been taken on appeal with respect to the facts accepted and recited by the chambers judge. I will repeat only those that are required to provide context to the issues before us.

[7] Ms. Cameron filed her Notice of Action and Statement of Claim on November 10, 2017. She alleged a number of facts:

- The Nova Scotia Association of Health Organizations ("NSAHO") is an organization offering long-term disability benefits to qualifying employees belonging to member health organizations;
- By agreement, the NSAHO relies on Manulife Financial, a private insurer, to administer its plan;
- By virtue of her enrolment in a policy with NSAHO, she was covered by, and the beneficiary of, a certain policy of employee long-term disability insurance with NSAHO that provided, amongst other things, certain disability benefits which would be paid in accordance with the policy;
- She had applied for disability benefits, but NSAHO rejected the application for benefits by way of written notice on May 4, 2016.

[8] In its Statement of Defence, the respondent asserted the action was "out of time and contract-barred." It plead the terms of the Plan agreement and the *LAA*.

[9] Immediately after filing its defence, the respondent filed a motion for summary judgment seeking an order dismissing the proceeding "on the basis of the one-year contractual time limit for commencement of action". The respondent relied on *Civil Procedure Rule* 13.04 (summary judgment on evidence), the *LAA*, and article 11.06 of the Plan.

[10] In support of its motion, the respondent filed the affidavit of Sue Eisener-Murphy, its Disability Program Manager. For the purposes of this appeal, the critical facts deposed to by Ms. Eisener-Murphy were that the Plan contained a one-year limitation period for commencing legal action and that it had been in existence, in its current form, since October 2010. Neither of those facts were challenged by Ms. Cameron in her responding affidavit or arguments. The motion was heard on March 1, 2018.

[11] The arguments made to the chambers judge were not complex. Succinctly, the respondent asserted:

- Article 11.06 of the Plan contains a one-year limitation period. It provides:

> 11.06 Legal Action
>
> 1) No legal action relating to this Plan may be brought against the Trustees or their staff and agents more than one year after Benefits have been

> denied. This time limitation begins to run from the date of the Claim Decision or subsequent Claim Review Decision if applicable.

- The *LAA* mandates a general two-year limitation period in s. 8; however, this must be read in light of s. 21, which provides:

> Agreements
>
> 21 (1) A limitation period established by this Act may be extended, but not shortened, by agreement.
>
> (2) Subsection (1) does not affect an agreement made before the coming into force of this Act.

- The "new" *LAA* came into force on September 1, 2015. The Plan pre-existed the *LAA*, having been last amended in 2010. By virtue of s. 21(2), the one-year limitation in the Plan applies;

- Ms. Cameron had filed her Statement of Claim outside the one-year limitation period, and it was therefore time-barred;

- Applying the analytical framework in *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89, a time-barred claim cannot give rise to any genuine issues of material fact or a question of law. In such circumstances, summary judgment must be granted.

[12] In response to the motion, Ms. Cameron submitted:

- The one-year limitation period embodied in the Plan did not trump s. 8 of the *LAA*, which provides:

> 8 (1) Unless otherwise provided in this Act, a claim may not be brought after the earlier of
>
> (a) two years from the day on which the claim is discovered; and
>
> (b) fifteen years from the day on which the act or omission on which the claim is based occurred.

- It was not the intent of the Legislature in enacting s. 21 to shorten the length of a statutory limitation period. This argument was premised upon caselaw involving insurance contracts and the view that the Plan was clearly a policy of insurance;

- In the event the court concluded that the contractual limitation period as set out in the Plan applied, given her incapacity, operation of s. 19(1) of the *LAA* had prevented the period from running. It provides:

> 19 (1) The limitation periods established by this Act do not run while a claimant is incapable of bringing a claim because of the claimant's physical, mental or psychological condition.

- As an insurer, the respondent owed her a duty to act in good faith, which it breached by failing to advise her of the Plan's one-year limitation period.

The Decision Under Review

[13] In his written reasons, the chambers judge considered not only the appropriate *Civil Procedure Rule* – 13.04, but also authority from this Court as to its proper application (*Shannex*). Ms. Cameron has not suggested otherwise.

[14] The chambers judge was fully cognizant of Ms. Cameron's arguments. He wrote:

> [14] The plaintiff argues that summary judgment should not be granted because there are genuine issues of material fact, and fact mixed with law, and her action has a real chance of success at trial.
>
> [15] She rests her argument specifically on the following:
>
> 1. The one-year limitation period in the Plan does not trump the two-year limit in the *Limitation of Actions Act*;
>
> 2. Even if the one-year limitation period in the Plan applies, this can be extended by Section 19 of the *Limitation of Actions Act* on the basis that Ms. Cameron was "incapable" and not reasonably able to bring a claim forward "for a period of time due to anxiety disorder";
>
> 3. Moreover, she argues that the plan is a "peace of mind" contract. By common law (*Fidler v. Sun Life Assurance Company of Canada*, 2006 SCC 30) and by the terms of the Plan itself in Article 5.06, *the trustees have a good faith obligation*, which was breached here by not providing specific notice to her of the one-year limitation period in the Plan, either in the May 4, 2016, denial letter, or the May 16, 2017, meeting, or any of their subsequent contacts, including with the Plan's representative Bernie MacPherson. (Emphasis in original)

[15] With respect to the third issue, the chambers judge found that the Plan was not a "peace of mind" contract or a policy of insurance. As such, the respondent did not owe Ms. Cameron a duty to bring to her attention the one-year limitation period embodied in the Plan. These findings were not challenged in her Notice of Appeal.

[16] More central to the arguments advanced before us, the chambers judge accepted the respondent's position that the Plan was an agreement as contemplated in s. 21(2) of the *LAA*. Therefore, it operated to displace the general two-year limit embodied in s. 8. This resulted in the Plan's contractual one-year period being applicable. He wrote:

> [20] Ms. Cameron does not dispute that at all material times, there is a so-called contractual one-year limitation period, and she did not strictly comply with it. She argues that she is not bound by that one-year limitation period. She relies on a statutory limitation period. I agree with both counsel that the new Act applies to this litigation, if there is a statutory limitation.

And further:

> [24] I note that Section 21 of the new Act which became effective on September 1, 2015, contemplates contractual limitation periods:
>
> > (1) The limitation period established by this Act may be extended, but not shortened, by agreement.
> >
> > (2) Subsection (1) does not affect an agreement made before the coming into force of this *Act*.
>
> [25] Thus, according to the new Act, through agreement, parties may have shortened a limitation period before September 1, 2015, which shortened limitation period survives by virtue of Section 21(2) of the new Act.
>
> [26] Therefore, the general limitation period in Section 8 of the new Act is superseded by the specific one year period in the Plan, being the "agreement" referred to in s. 21(2).

[17] The chambers judge then addressed Ms. Cameron's argument centering on s. 19(1) of the *LAA*. He concluded it did not apply to her claim, reasoning as follows:

> [28] On its face, the applicability of this section only applies to "the limitation periods established by this Act". The so-called contractual one-year period is therefore not affected by Section 19. It cannot be extended by "incapacity".

[18] His analysis did not conclude at this point. In the alternative, if s. 19(1) did apply, the chambers judge considered whether the time to commence an action was extended due to Ms. Cameron's alleged incapacity. He concluded:

> [48] Regarding the plaintiff's suggested "incapacity", there is *no evidence* that on or about May 13, 2016, she did not understand the key factual trigger to the running of the limitation period here – i.e. that she had been denied long-term disability benefits. She is claiming that she understood her benefits were

> terminated, but not that she had to appeal within one year if she wished to litigate. She must have been aware that there was an internal review and appeal procedure, due to the repeated references to the procedure, and copies of the relevant articles from the Plan. Notably, she did not engage that process either. Ms. Cameron had one year from May 13, 2016, to file a statement of claim. There is no evidence that she was incapable of understanding the information contained in the May 4, 2016, letter on that date or during the ensuing year, and appreciat[ing] the reasonably foreseeable consequences of her making a decision, or not, in relation thereto.
>
> [49] If Section 19 of the new Act is applicable, and: the running of the limitation period is suspended as a result of Ms. Cameron having been "incapable", that suspension ends as of a day that is within six months of the end of the one-year limitation period; then the limitation period is deemed by law to be extended "to include the day that is six months after the day on which the suspension ends".
>
> [50] The limitation period here cannot be extended by any claimed "incapacity". Ms. Cameron has not met the evidentiary standard. The limitation period ended May 13, 2017. There is no genuine issue of material fact in relation to the pleaded limitation period. Ms. Cameron did not file her statement of claim until November 6, 2017. This is a difference of five months. (Emphasis in original)

[19] In conclusion, the chambers judge applied the *Shannex* framework as follows:

> [65] **First Question**: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?
>
> It does not – The defendant, as the moving party has the onus and has established that there is no genuine issue of fact or mixed law and fact for resolution at trial regarding the expiry of the limitation period. It had expired by May 13, 2017, long before the statement of claim was filed November 6, 2017.
>
> [66] **Second Question**: Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?
>
> Yes, it does**;** namely, the "incapacity" issue which could arguably suspend the running of the limitation period.
>
> [67] **Third Question**: Does the challenged pleading have a real chance of success?
>
> No, it does not. The plaintiff has the onus to establish the "incapacity" referred to in section 19 of the new Act. She has not established that there is a genuine issue of fact or mixed law and fact for resolution at trial regarding her argued "incapacity" which would affect the expiry of the relevant limitation period.

> [68] Therefore the motion for summary judgment on evidence must be granted.

[20] In a footnote, the chambers judge provided the following clarification regarding the second question:

> This is so only by presuming that Section 19 of the new *Act* could apply to the so-called contractual limitation period. As a matter of law, I have concluded that it does not apply, but I will complete the analysis as if it did apply.

Issues

[21] Ms. Cameron raises two issues on appeal:

1. Did the chambers judge err in his interpretation and application of s. 21(2) of the *LAA*?; and
2. Did the chambers judge err in his interpretation and application of s. 19(1) of the *LAA*?

[22] As will be discussed later, it is only necessary to address the first issue in order to dispose of the appeal.

Standard of Review

[23] The standard of review applicable to summary judgment motions is well-known. In *Burton Canada Company v. Coady*, 2013 NSCA 95, Justice Saunders wrote:

> [19] The standard of review applicable to summary judgment motions in Nova Scotia is settled law. The once favoured threshold inquiry as to whether the impugned order under appeal did or did not have a terminating effect, is now extinct. There is only one standard of review. We will not intervene unless wrong principles of law were applied or, insofar as the judge was exercising a discretion, a patent injustice would result. See for example, **AMCI Export Corporation v. Nova Scotia Power Inc.**, 2010 NSCA 41; **Innocente v. Canada (Attorney General)**, 2012 NSCA 36 at ¶21-29; **WBLI Chartered Accountants, supra**; and **Nova Scotia v. Roué**, 2013 NSCA 94.

Analysis

Did the chambers judge err in his interpretation and application of s. 21(2) of the LAA?

[24] The chambers judge's analysis was set out earlier herein. He correctly concluded that the Plan was an "agreement" as contemplated in s. 21(2). He also correctly concluded that as a result, the two-year limitation embodied in s. 8 of the *LAA* was superseded by the Plan's shorter contractual limitation period.

[25] On appeal, Ms. Cameron attempted to raise a number of new arguments that were not put before the chambers judge, nor specifically raised in her Notice of Appeal. I do not intend to canvass these late in the day allegations of error. None serve to establish any error in the chambers judge's interpretation or application of s. 21(2).

[26] I would dismiss this ground of appeal.

Did the chambers judge err in his interpretation and application of s. 19(1) of the LAA?

[27] I decline to address the above issue for two reasons. Firstly, it is moot. After concluding that s. 19(1) did not apply to extend the Plan's one-year limitation period, the chambers judge determined in the alternative that Ms. Cameron did not prove she was incapacitated. She has not appealed that finding. Even if we were to conclude that the chambers judge's initial interpretation was incorrect, it would not affect the outcome of the appeal.

[28] Secondly, given the nature of the record and arguments before us, I would prefer to leave a determination of the applicability of s. 19(1) to the Plan's limitation period to a different day.

Disposition

[29] For the reasons set out above, I would dismiss the appeal. Ms. Cameron shall pay costs of $1,500.00, inclusive of disbursements, to the respondent.

Bourgeois, J.A.

Concurred in:

Beveridge, J.A.

Bryson, J.A.